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In The

Supreme Court of the United States

KAY BARNES, IN HER OFFICIAL CAPACITY AS MEMBER OF THE BOARD OF POLICE COMMISSIONERS OF KANSAS CITY, MISSOURI, ET AL.,

Petitioners,

v.

JEFFREY GORMAN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether punitive damages are among the full panoply of remedies Congress made available to plaintiffs suing for violations of Title II of the Americans with Disabilities Act or Section 504 of the Rehabilitation Act of 1973.

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STATEMENT OF THE CASE

The sole issue properly presented in this case is whether punitive damages are ever available to plaintiffs under Title II of the ADA and Section 504 of the Rehabilitation Act of 1973. Whether the facts of this or any other case merit such an award is not before the Court. Nonetheless, while purporting to present a summary of the facts in the light most favorable to respondent and to the jury verdict in the district court, petitioners have loaded their factual statement with irrelevant descriptions of their own evidence, which the jury did not credit.

A. Facts

The facts established at trial and credited by the jury can be quickly summarized. Respondent Jeffrey Gorman is paraplegic as a result of a spinal cord injury and uses a wheelchair for mobility. Tr. 50-51. On the night of May 30, 1992, he visited a bar in Kansas City, Missouri, where he hoped to meet an acquaintance. Shortly after his arrival, a bouncer ejected him from the premises because the bar did not allow wheelchairs on the dance floor. Tr. 58-63.

Believing that he had been discriminated against, Mr. Gorman sought the assistance of nearby uniformed police officers. Tr. 64-65. The officers, who turned out to be moonlighting as private security, instead arrested Mr. Gorman for trespassing and summoned a Kansas City police van to take him to the station. Tr. 70, 65.

When the van arrived, Mr. Gorman saw that it had no wheelchair lift, no wheelchair restraints, and no alternative means of securely transporting a person with a spinal cord injury. Mr. Gorman told the police officers that he would not be able to support himself in the van's seats and could not safely be transported in the van. Instead of heeding Mr. Gorman's warnings, the officers lifted him from his wheelchair and placed him on a bench in the back of the van. Because he could not sit upright on the bench, the officers attempted to

use his belt to tie him to a wire mesh wall behind the bench. J.A. 5-10.

When the van started moving, Mr. Gorman could not hold himself upright. During the trip, his belt broke and he was thrown to the floor of the van, where he remained the rest of the way to the station. His full urine bag (which the police officers had not allowed him to empty before loading him onto the van) broke when he fell, soaking him. Tr. 79-83. He suffered severe injuries to his shoulder and back from the fall as well as an infection that resulted from urine being forced back into his body by pressure on the bag before it burst. Mr. Gorman's injuries required extensive medical treatment including shoulder surgery. Unfortunately, the back injuries Mr. Gorman suffered in the van cannot be surgically repaired because of his preexisting spinal injury. As a result, Mr. Gorman continues to suffer intense pain and spasms in his lower extremities—conditions that are likely to be permanent and that have prevented him from continuing to work full-time. J.A. 12-20.[1] The actual damages Mr. Gorman incurred from his treatment at the hands of the police included lost wages, medical bills, pain and suffering, and humiliation.

Mr. Gorman's injuries are not attributable to an isolated incident of police misconduct. The evidence established that the officers who arrested and transported Mr. Gorman had no training in the safe transportation of disabled persons, and that the Kansas City Police Department had no vans that were accessible to passengers in wheelchairs and no policies concerning the transportation of people with disabilities. J.A. 25-29, 42. Moreover, petitioners stipulated that although they had repeatedly filed written assurances with the federal government that their practices and policies complied with the Rehabilitation Act of 1973, those assurances were false. J.A.

[1] Petitioners' outlandish speculation that Mr. Gorman suffered these injuries while careening down a hill with a woman on his lap was contradicted by Mr. Gorman's evidence at trial and rejected by the jury.

69. Petitioners also stipulated that they did not begin to bring themselves into compliance with the Rehabilitation Act nor to train their officers about the requirements of the ADA and the Rehabilitation Act until after Mr. Gorman was injured. J.A. 69-70.

B. Procedural History

The procedural history of this case is convoluted, but its relevant features are straightforward. Mr. Gorman sued petitioners, Kansas City's Police Commissioners, in the United States District Court for the Western District of Missouri, seeking actual and punitive damages under Title II of the ADA and Section 504 of the Rehabilitation Act. After two appeals, the case was tried to a jury, which rendered a verdict for Mr. Gorman and awarded over $1 million in compensatory damages and $1.2 million in punitive damages.

Petitioners moved for judgment as a matter of law, arguing that punitive damages are never available against any defendant for violations of Title II or Section 504. Petitioners did not assert that their status as a governmental entity rendered them immune from punitive damages under the rationale of *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981). The district court accepted petitioners' argument and set aside the jury's award of punitive damages.

The parties filed cross-appeals. Mr. Gorman's appeal argued that punitive damages are available under Title II of the ADA and Section 504, while petitioners' appeal rested primarily on their argument that they were an instrumentality of the State of Missouri and were entitled to Eleventh Amendment immunity from any action for damages (compensatory or punitive) under Title II or Section 504. In opposing Mr. Gorman's appeal, petitioners again did not argue that punitive damages were unavailable under *City of Newport.*

The Eighth Circuit reversed the district court's holding that punitive damages are unavailable under Title II and Section 504, but affirmed in all other respects. The court of ap-

peals rejected petitioners' argument that the Kansas City Board of Police Commissioners is an arm of the State entitled to Eleventh Amendment immunity from suit in federal court. With respect to the award of punitive damages, the court ruled that because both Title II and Section 504 create private rights of action without specifying the precise relief available, any appropriate relief is presumptively available under this Court's decision in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992). The court held that punitive damages fall within the scope of the relief available under Title II and Section 504 in appropriate circumstances. Accordingly, the Eighth Circuit remanded the case to the district court for "an independent review of the evidence to determine whether it supports punitive damages." Pet. App. 16a.

SUMMARY OF ARGUMENT

Title II of the Americans with Disabilities Act, enacted in 1990, broadly outlaws discrimination against people with disabilities in the provision of public services by public entities. Title II expands and extends rights previously granted only against recipients of federal funds under Section 504 of the Rehabilitation Act of 1973. Consistent with the broad purposes of Title II, Congress adopted a sweeping set of remedies. In contrast with other provisions of the ADA, which set forth express limits on remedies, Title II adopted the remedial provisions applicable to Section 504 of the Rehabilitation Act (as well as other federal civil rights statutes such as Title VI and Title IX)—remedies that had already been held by this Court to include private rights of action with no expressly stated limits on the relief available.

In adopting the unfettered remedial provisions of Title II, Congress unambiguously provided plaintiffs with a right of action for damages, and, indeed, with the full panoply of remedies generally available at law and in equity. Congress' stated intent to provide the full array of legal and equitable relief corresponds precisely with the generally applicable presumption that a federal court may award any appropriate

relief when Congress provides a private right of action and does not clearly limit the relief available. *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992).

Because punitive damages have long been recognized by this Court as an important tool in the arsenal of relief available in the federal courts under appropriate circumstances, their availability under Title II of the ADA, as well as under Section 504 of the Rehabilitation Act, is dictated both by Congress' affirmative desire to make available the full panoply of remedies and by the *Franklin* presumption that all such remedies should be provided unless Congress directs otherwise. Moreover, punitive damages serve the purposes of both Title II of the ADA and Section 504 by supplementing other enforcement mechanisms and adding the deterrence necessary to achieve Congress' goal of eliminating discrimination against people with disabilities.

Petitioners' status as a municipality does nothing to alter these conclusions. The argument that petitioners' governmental status bars punitive damages under *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), was never presented or decided below and is thus not before the Court. Even if it were, any presumption that punitive damages are not available against government entities would be overcome by clear evidence of congressional intent that governmental bodies be subject to the same rules of liability under the ADA and the Rehabilitation Act as private persons. Moreover, the policy considerations dispositive in *Newport* are absent here. In particular, the alternative deterrent mechanism of punitive damages against individual officials who violate the law is unavailable under the ADA and Rehabilitation Act, which have not been held to create rights of action against individuals. In addition, punitive damages awards will at times be necessary to prevent local governments and their taxpayers from reaping financial windfalls through noncompliance with the ADA.

ARGUMENT

I. TITLE II OF THE ADA CREATES A PRIVATE RIGHT OF ACTION WITH A FULL PANOPLY OF REMEDIES.

Underlying all the arguments of petitioners and the Solicitor General is the notion that the right of action at issue in this case is an "implied" one. But unlike other cases where the "implication" of a private right of action is a matter of debate and inference, here it is manifest that Congress explicitly created a private right of action in Title II of the ADA when it expressly incorporated remedial provisions under which the existence of a private right of action had already been established both by judicial decision and by direct legislation. Equally apparent is that the right of action Congress created carries with it a panoply of remedies specifically including damages. Because an understanding of these points is critical to the ultimate determination of the relief available under Title II, a detailed explanation of the remedial provisions of Title II and their relationship with other parts of the ADA—and other civil rights statutes—is necessary.

A. Congress Deliberately Created a Private Right of Action to Enforce Title II of the ADA.

The enactment of the Americans with Disabilities Act reflected Congress' determination to eradicate discrimination against people with disabilities and to mandate the steps needed to provide them with equal access to employment, government services, and public accommodations. To achieve these ends, Congress invoked all of its powers, "including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. § 12101(b)(4). The resulting legislation, as this Court has recognized, is a "broad mandate," "sweeping" in its scope and "expansive" in its purposes—"a milestone on the path to a more decent, tolerant, progressive society." *PGA*

Tour, Inc. v. Martin, 532 U.S. 661, 675, 680 (2001) (quoting *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356, 375 (2001) (Kennedy, J., concurring)).

The ADA's substantive provisions are divided into three titles addressing different aspects of the problem of unequal treatment of people with disabilities and providing remedies of very different scope. Title I of the Act generally forbids employment discrimination against people with disabilities by both governmental and private entities. ADA § 102, 42 U.S.C. § 12112. As originally enacted, Title I incorporated the "circumscribed remedies" (*Landgraf v. USI Film Products*, 511 U.S. 251, 285 n.38 (1994)) provided by Title VII of the Civil Rights Act of 1964—remedies that, as of 1990, did not include damages. ADA § 107(a), 42 U.S.C. § 12117(a) (incorporating remedies of 42 U.S.C. §§ 2000e-4, -5, -6, -8, and -9); *see, e.g., Landgraf*, 511 U.S. at 252 ("Before the enactment of the 1991 [Civil Rights] Act, Title VII afforded only 'equitable' remedies."); *United States v. Burke*, 504 U.S. 229, 238 (1992) (before passage of the Civil Rights Act of 1991, Title VII did "not allow awards of compensatory or punitive damages; instead, it limit[ed] available remedies to backpay, injunctions, and other equitable relief").

Similarly, Title III of the ADA, which forbids discrimination in the provision of "public accommodations" by private entities (*see* ADA § 302, 42 U.S.C. § 12182), incorporates the limited remedies set forth in 42 U.S.C. § 2000a-3(a) for violations of Title II of the Civil Rights Act of 1964, which prohibits racial discrimination in public accommodations. *See* ADA § 308(a)(1), 42 U.S.C. § 12188(a)(1). Section 2000a-3(a) in turn provides a private right of action only for "preventive" (*i.e.*, declaratory or injunctive) relief. *See Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968). Like Title II of the Civil Rights Act, Title III of the ADA provides for enforcement actions brought by the Attorney General, in which civil penalties and monetary damages for victims of discrimination are available only if the Attor-

ney General requests them. ADA § 308(b)(2), 42 U.S.C. § 12188(b)(2). Title III does not authorize a private right of action for damages, and it expressly forbids punitive damages. ADA § 308(b)(4), 42 U.S.C. § 12188(b)(4).

The remedial provisions of Title II of the ADA, at issue here, are significantly different from those of Titles I and III. Title II broadly outlaws unequal treatment of people with disabilities by State and local governments, by forbidding both outright, intentional discrimination and exclusion from or denial of the benefits of government services, programs, or activities. ADA § 202, 42 U.S.C. § 12132. The substantive prohibitions of Title II are based on its predecessor, Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794), but its coverage of public entities is broader: Whereas Section 504 was based in part on the Spending Clause and was limited to federal agencies and programs and activities receiving federal financial assistance, Title II of the ADA, grounded on Congress' powers under the Commerce Clause and the Fourteenth Amendment, applies to all activities of State and local governments, regardless of the sources of their funding. Moreover, Title II's antidiscrimination mandate goes further than Section 504's. *See Baird v. Rose*, 192 F.3d 462, 469 (4th Cir. 1999) (Title II, unlike Section 504, prohibits discrimination that is not "solely" on account of disability).

Like Titles I and III, Title II has its own remedial provision. But unlike the other titles, its remedial scheme does not limit the private remedies available. Instead, Title II expressly incorporates the remedial scheme for violations of Section 504 of the Rehabilitation Act. Thus, Section 203 of the ADA (42 U.S.C. § 12133) states that the remedies available under Section 505 of the Rehabilitation Act (29 U.S.C. § 794a) for violations of Section 504 "shall be the remedies ... [the ADA] provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title." ADA § 203, 42 U.S.C. § 12133. The relevant portion of Section 505, which was added to the Rehabilitation Act in

1978, provides in turn that "the remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by" any violation of Section 504. 29 U.S.C. § 794a(a)(2).[2]

The significance of these provisions, from the standpoint of the enacting Congress in 1990, is clear: Title II of the ADA authorizes a private right of action for violations of the requirements of Section 202 of the Act. Several factors support this conclusion. First, when the ADA was enacted, this Court had already recognized that Section 505(a)(2) of the Rehabilitation Act, whose remedies Section 203 of the ADA adopted, created a private right of action for retrospective relief to enforce Section 504 of the Rehabilitation Act. *See Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 626 (1984) ("This case requires us to clarify the scope of *the private right of action to enforce Section 504 of the Rehabilitation Act....*") (emphasis added).

Second, this Court had earlier recognized a private right of action to enforce Title IX. *Cannon v. University of Chicago*, 441 U.S. 677 (1979). Title IX's remedial provisions parallel those of Title VI. Indeed, this Court based its recognition of a private right of action under Title IX in large part on congressional awareness at the time Title IX was enacted of lower-court decisions holding that there was a private right of action under Title VI. *Id.* at 694-98. Likewise, the drafters of Title II of the ADA can only have intended to enact a private right of action when they incorporated the Rehabilitation Act's remedies, which in turn incorporated those of Title VI, which were identical to those that this Court had held created a private right of action in *Cannon*. *Cf. id.* at 696-97 ("It is

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[2] Also relevant is Section 505(b) of the Rehabilitation Act, which provides that a court may grant the prevailing party (other than the United States) a reasonable attorney's fee in "any action" brought under the Act. 29 U.S.C. § 794a(b). That provision demonstrates that the drafters of Section 505 contemplated that it authorized a right of action.

always appropriate to assume that our elected representatives, like other citizens, know the law ...").

Third, seven of the Justices in the fractured opinions in *Guardians Association v. Civil Service Commission of the City of New York*, 463 U.S. 582 (1983), recognized a private right of action under Title VI itself, although the Justices were not in accord on the scope of that private right. *See id.* at 593-95 (opinion of White, J., joined by Rehnquist, J.); *id.* at 612 (O'Connor, J., concurring); *id.* at 615 (Marshall, J., dissenting); *id.* at 635 (Stevens, J., joined by Brennan and Blackmun, JJ., dissenting). Again, the ADA's adoption of Section 504's remedies, which in turn incorporated the Title VI remedies that were acknowledged in *Guardians* to support a private right of action, manifested a clear congressional intent to enact a private right of action.

Fourth, in 1986, Congress had enacted the Rehabilitation Act Amendments to abrogate the States' Eleventh Amendment immunity from damages in actions brought to enforce Section 504 (as well as in actions under Title VI, Title IX, and the Age Discrimination Act of 1975). 42 U.S.C. § 2000d-7(a). The legislation further provided that "[i]n a suit against a State for a violation of [Section 504], remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in [a] suit against any public or private entity other than a State." 42 U.S.C. § 2000d-7(a)(2). As this Court has recognized, the Rehabilitation Act Amendments can only be understood as reflecting congressional ratification of a private right of action under Section 504 and the other statutes referenced in 42 U.S.C. § 2000d-7(a). *See Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 72-73 (1992); *id.* at 78 (Scalia, J., concurring in the judgment). This congressional endorsement of a Section 504 right of action plainly extends to Title II of the ADA, given Title II's explicit incorporation of Section 504's remedies.

Finally, the legislative history of Title II of the ADA dispels any doubt on the issue by stating expressly that Congress was aware of and intended to incorporate into Title II the private right of action to enforce Section 504:

> Section [203] incorporates the remedies, procedures and rights set forth in Section 505 of the Rehabilitation Act of 1973. ... *The Rehabilitation Act provides a private right of action, with a full panoply of remedies available*, as well as attorney's fees.

H.R. Rep. No. 101-485(III), at 52 (1990) (emphasis added).

B. The Panoply of Title II Remedies Includes Damages.

In *Guardians*, a "clear majority expressed the view that damages were available under Title VI in an action seeking remedies for an intentional violation." *Franklin*, 503 U.S. at 70. Of course, as the Congress that enacted the ADA well knew, the damages remedy available under Title VI would necessarily be available under Section 504, and thus was also incorporated into Title II of the ADA when it adopted the remedies available for violations of Section 504.

In addition, the Rehabilitation Act Amendments of 1986 presupposed the existence not only of a private right of action to enforce Section 504, but also of a damages remedy—otherwise, abrogation of the States' Eleventh Amendment immunity would have been unnecessary, and the statute's reference to the availability of "remedies both at law and in equity" (42 U.S.C. § 2000d-7(a)(2)) would have made no sense. Thus, the 1986 legislation "must be read ... not only 'as a validation of *Cannon*'s holding,' ... but also as an implicit acknowledgment that damages are available." *Franklin*, 503 U.S. at 78 (Scalia, J., concurring in the judgment).

Again, the legislative history of the ADA confirms that Congress adopted a damages remedy when it enacted Title II. The House Judiciary Committee Report's explicit statement that the private right of action under Section 504, which Title

II adopts, comes "with a full panoply of remedies available" is clear enough standing alone. H.R. Rep. No. 101-485(III), at 52. To drive home the point, the Committee Report cited *Miener v. State of Missouri*, 673 F.2d 969 (8th Cir. 1982), which had expressly affirmed the availability of damages in a private right of action under Section 504. H.R. Rep. No. 101-485(III), at 52 n.62. In enacting Title II, therefore, Congress was aware of and adopted judicial decisions holding damages available under Section 504.[3]

Not every court that had ruled on the issue as of 1990 had agreed with *Miener* that damages were available for a violation of Section 504, but whether *Miener* in fact correctly interpreted the Rehabilitation Act is now beside the point. What matters is that Congress understood there to be a private right of action for damages for violations of Section 504 when it adopted Title II of the ADA. By expressly adopting the remedies it *understood* to be available under Section 504, Congress created damages remedy under Title II. *Cf. Cannon*, 441 U.S. at 711 ("[T]he relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was.") (citation omitted).[4]

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[3] *Nelson v. Thornburgh*, 567 F. Supp. 369 (E.D. Pa. 1983), another case approvingly cited in the House Judiciary Committee Report (H.R. Rep. No. 101-485(III), at 51), also held that Section 504 provided a "full panoply" of remedies, including damages. 567 F. Supp. at 382-83. *Nelson*'s "full panoply" language was cited by another district court in holding punitive damages available under Section 504. *Fitzgerald v. Green Valley Area Educ. Agency*, 589 F. Supp. 1130, 1138 (D. Iowa 1984).

[4] For this reason, the arguments made by petitioners and the Solicitor General about the state of the law in 1978, when Congress enacted Section 505 of the Rehabilitation Act, have little relevance. The determinative issue now is not what remedies the Congress that enacted Section 505 thought were available under Title VI, but what remedies the Congress that enacted the remedial provisions of Title II of the ADA in 1990 provided. *Cannon* illustrates the point. There, the Court held that the argument that Title VI was not originally intended to provide a private right

(*Footnote continued*)

This Court's decision in *Franklin* confirms that the Congress that enacted the ADA was correct in understanding that Section 504 included a private damages remedy. *Franklin* holds that, in cases involving intentional violations, damages are an available remedy in the implied right of action under Title IX. 503 U.S. at 76. *Franklin*'s reasoning, which relies heavily on the majority's recognition of a Title VI damages remedy in *Guardians*, on the Rehabilitation Act Amendments of 1986, and on "the traditional presumption in favor of any appropriate relief" (*id.* at 73) when Congress creates a right of action, is as applicable to Section 504 (and to Title II of the ADA) as it is to Title IX. *Franklin* thus underscores that when Congress enacted Title II of the ADA, it *correctly* believed that a damages remedy was available under Section 504, and it expressly incorporated that remedy into Title II.

II. THE PANOPLY OF TITLE II AND SECTION 504 REMEDIES INCLUDES PUNITIVE DAMAGES.

Given that Congress created a private right of action for damages in Title II of the ADA, the issue here is whether that right of action, and its preexisting counterpart under the Rehabilitation Act, is to be truncated to exclude altogether the

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of action when it was enacted in 1964 was largely irrelevant to the question whether Congress intended to create a private right of action when it incorporated Title VI's provisions into Title IX in 1972: "Even if these arguments were persuasive with respect to Congress' understanding in 1964 when it passed Title VI, they would not overcome the fact that in 1972 when it passed Title IX, Congress was under the impression that Title VI could be enforced by a private action and that Title IX would be similarly enforceable." *Cannon*, 441 U.S. at 710-11. Thus, the fact that as of 1978, some lower courts had (erroneously) held that *no* damages, compensatory or punitive, were available under Title VI (*see Rendon v. Utah State Dept. of Employment Sec. Job Serv.*, 454 F. Supp. 534, 536-37 & n.3 (D. Utah 1978)), is of no significance in resolving the scope of the remedies Congress intended to adopt when it enacted the ADA in 1990, following twelve years of legal developments that had convinced Congress that damages were available under both Title VI and Section 504.

possibility of awarding punitive damages, regardless of the circumstances of a particular case. Principles firmly established by the decisions of this Court foreclose circumscribing the right of action under Title II of the ADA or the Rehabilitation Act in such a manner.

A. Any Appropriate Relief—Including Punitive Damages—Is Presumptively Available.

As the Eighth Circuit correctly perceived, this Court's most authoritative pronouncement on the issue is *Franklin v. Gwinnett County Public Schools*. There, the issue was whether the private right of action under Title IX, which the Court had previously recognized in *Cannon*, encompassed a damages remedy in cases involving intentional violations. *Franklin*'s holding that damages were available was based on the principle "that if a right of action exists to enforce a federal right and Congress is silent on the question of remedies, a federal court may order any appropriate relief," 503 U.S. at 69—a principle that, the Court stated, "has deep roots in our jurisprudence." *Id.* at 66.

Accordingly, the Court held, "although we examine the text and history of a statute to determine whether Congress intended to create a right of action, ... we presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise." *Id.* Elsewhere in the opinion, the Court stated the rule as follows: "[A]ll appropriate relief is available in an action brought to vindicate a federal right when Congress has given no indication of its purpose with respect to remedies," *id.* at 68; "[T]he 'existence of a statutory right implies the existence of all necessary and appropriate remedies,'" *id.* at 69 (quoting *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969)); "[T]he traditional presumption [is] in favor of a federal court's power to award appropriate relief in a cognizable cause of action," *id.* at 70; "The general rule, therefore, is that absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute," *id.* at 70-71; "[T]he traditional presumption [is] in favor of any appropriate relief for violation of a federal right," *id.* at 73. The Court emphasized the importance of "our historic judicial authority to award appropriate relief in cases brought in our court system," and declined to engage in "selective abdication" of this authority by ruling out particular remedies absent clear congressional directives foreclosing their use. *Id.* at 74.

Franklin rested on a long line of decisions of this Court holding that "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Bell v. Hood*, 327 U.S. 678, 684 (1946); *see Franklin*, 503 U.S. at 66-68 (citing case law underlying *Bell v. Hood*). The opinion in *Franklin* pointed out that this Court had consistently adhered to this principle in cases such as *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969), *Carey v. Piphus*, 435 U.S. 247 (1978), and *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353 (1982). More pertinent here, the Court observed that the acceptance of a damages remedy under Title VI by the majority of the Justices in *Guardians*, as well as the Court's recognition of a retrospective monetary remedy for Section 504 violations in *Consolidated Rail Corp. v. Darrone*, 465 U.S. at 631, reflected applications of the presumption in favor of all appropriate remedies in cases where a right of action exists.

The *Franklin* presumption is fully applicable to punitive damages. This Court has repeatedly recognized that punitive damages are a part of the ordinary remedial arsenal of the courts and have long been "a firmly established feature of American law." *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 26 (1991) (Scalia, J., concurring in the judgment). In *Curtis v. Loether*, 415 U.S. 189 (1974), the Court held that the Seventh Amendment afforded a right to trial by jury in actions seeking damages under Title VIII of the Civil Rights Act of 1968 (42 U.S.C. § 3613), and observed that "the relief

sought here—actual and punitive damages—is the traditional form of relief offered in the courts of law." 415 U.S. at 196.

The Court has also acknowledged that punitive damages are among the judicial remedies typically available for aggravated wrongs in cases such as *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984), *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257, 274, 278 & n.24 (1989), and *Haslip*, 499 U.S. at 15-17. As the Court stated in *Molzof v. United States*, 502 U.S. 301, 306 (1992):

> Although the precise nature and use of punitive damages may have evolved over time, and the size and frequency of such awards may have increased, this Court's decisions make clear that the concept of "punitive damages" has a long pedigree in the law. "It is a well-established principle of the common law, that in actions for trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offense rather than the measure of compensation to the plaintiff." *Day v. Woodworth*, 13 How. 363, 371 (1852).

Or, as the Court put it more succinctly in *United States v. Burke*: "[P]unitive or exemplary damages are generally available in those instances where the defendant's conduct was intentional or reckless." 504 U.S. at 237.

Consistent with its recognition that punitive damages are among the range of remedies ordinarily available (where circumstances warrant) in American courts, this Court has held that punitive damages are potentially available in actions to vindicate rights guaranteed by federal law even in the absence of express statutory authorization, except where Congress has foreclosed them. Thus, the Court has held that punitive damages are available in actions under 42 U.S.C. § 1983, *see Smith v. Wade*, 461 U.S. 30 (1983); *Carey v. Piphus*, 435 U.S. at 257 n.11, in actions under 42 U.S.C. § 1981, *see Johnson v. Railway Express Agency*, 421 U.S. 454

(1975),[5] and, perhaps most significantly, in *implied* rights of action under the Constitution (*i.e.*, *Bivens* actions), *see Carlson v. Green*, 446 U.S. 14, 22 (1980).

In *Carlson v. Green*, the Court stated its reasons for allowing punitive damages in *Bivens* actions in a nutshell: "Punitive damages are 'a particular remedial mechanism normally available in the federal courts,' ... and are especially appropriate to redress the violation by a Government official of a citizen's constitutional rights." 446 U.S. at 22 (quoting *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 397 (1971)). The reasons the *Carlson* Court gave for the availability of punitive damages in a right of action implied from the Constitution are equally (if not more) applicable to a right of action Congress has deliberately created by statute: As one of the "remedial mechanism[s] normally available in the federal courts" (*id.*), punitive damages are, under the reasoning of *Franklin*, presumptively available (where appropriate) in an otherwise cognizable cause of action to vindicate statutory rights.

B. No Clear Congressional Directive Bars Punitive Damages under Title II or Section 504.

Under *Franklin*, the issue whether punitive damages are available for violations of Title II of the ADA (and Section 504 of the Rehabilitation Act) depends on whether "there is a clear direction to the contrary by Congress." *Franklin*, 503 U.S. at 70-71. Absent such a clear direction, the *Franklin* presumption in favor of any appropriate relief controls.

As both the majority and the concurrence in *Franklin* observed, only rarely will a statute provide a clear direction one way or the other about the remedies available under an im-

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[5] *See also Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 851 (2001) ("42 U.S.C. § 1981 permit[s] the recovery of unlimited compensatory and punitive damages in cases of intentional race and ethnic discrimination....").

plied right of action. As the majority put it, "it is hardly surprising" when Congress "[says] nothing about the applicable remedies for an implied right of action." *Id.* at 71; *see also id.* at 76 (Scalia, J., concurring in the judgment).

Title II of the ADA, however, is not a statute in which the existence of a private right of action is a matter of inference in the face of congressional silence or ambiguous legislative history. Rather, Title II represents an instance where Congress expressly adopted a right of action. In so doing, Congress did not provide a "clear direction" that punitive damages or any other particular remedies be foreclosed. Rather, Congress' action affirmatively manifests an intent that there be no restrictions on the nature of the relief available to plaintiffs under Title II.

As explained above, at the time Congress enacted Title II and adopted the remedies available under Section 505(a) of the Rehabilitation Act, case law and prior congressional action (especially the adoption of the Rehabilitation Act Amendments of 1986) pointed unequivocally to the existence of an implied right of action for monetary damages under Section 505(a) for violations of Section 504 of the Rehabilitation Act. Under such circumstances, where there is no doubt that Congress created a private right of action, there is nothing "question begging" (*Franklin*, 503 U.S. at 77 (Scalia, J., concurring in the judgment) about inferring an intent to allow any appropriate relief when Congress has not imposed any limits on the available remedies. Rather, as even the concurring Justices in *Franklin* agreed, "[w]e can plausibly assume acquiescence in our *Bell v. Hood* presumption when the Legislature says nothing about remedy in expressly creating a private right of action; perhaps even when it says nothing about remedy in creating a private right of action by clear textual implication ...." *Id.* Here, Congress' express adoption of a right of action that had definitively been held to exist places the ADA's Title II in the category of statutes that expressly create a private right of action but do not define the

scope of the remedy. Congress' decision not to limit the relief available under such a statute strongly supports the availability of any relief, including, in appropriate cases, punitive damages.

Moreover, Title II's legislative history shows that Congress' failure to limit the relief available under Title II was not inadvertent, but reflected a deliberate choice to provide plaintiffs using the private right of action borrowed from the Rehabilitation Act with "a full panoply of remedies." H.R. Rep. No. 101-485(III), at 52. Given that punitive damages are undoubtedly part of the "full panoply of tools traditionally used by courts to do justice between parties," *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 53 (1979) (Blackmun, J., concurring in the result), the legislative history shows that Congress intended that they be among the remedies potentially available in appropriate cases under Title II.[6] Thus, far from overcoming the *Franklin* presumption in favor of any appropriate relief, the direct evidence of Congress' intent jibes perfectly with it.

The overall structure of the ADA also reveals that if Congress had intended to foreclose punitive damages under Title II, it would have done so expressly. A comparison of Title II's remedial provisions to those in Title III of the Act is particularly instructive. As noted above (at pp. 7-8), Title III, which outlaws disability discrimination in private-sector "public accommodations," creates a limited damages remedy enforceable only in actions brought by the Attorney General. Title III permits the recovery of "such other relief as the court considers to be appropriate, including monetary damages to persons aggrieved when requested by the Attorney General." ADA § 308(b)(2)(B), 42 U.S.C. § 12188(b)(2)(B).

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[6] *See also Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627, 648 n.11 (1999) (statute intended to provide "full panoply of remedies" for patent violations would have subjected States to punitive damages but for Eleventh Amendment).

However, the statute also expressly provides that "[f]or purposes of subsection (b)(2)(B) of this section, the term 'monetary damages' and 'such other relief' does not include punitive damages." *Id.* § 308(b)(4), 42 U.S.C. § 12188(b)(4).

The statute's express exclusion of punitive damages illustrates not only that Congress knew how to—and did—exclude punitive damages when it wanted to do so, but also, and more importantly, that Congress was aware that if it provided a right of action for "monetary damages" and did *not* exclude punitive damages, the likely (and logical) inference would be that it intended to permit them. Put another way, the provision implies that a "damages" remedy *includes* punitive damages unless the term is defined to exclude them—a result that, again, is precisely in line with the general presumption in favor of any appropriate relief established in such cases as *Bell v. Hood* and *Franklin*. Given that the legislative history of Title II makes clear that Congress was specifically aware that it was providing a right of action for *damages* when it adopted the remedies of the Rehabilitation Act (*see supra* pp. 6-13), Congress' failure to exclude *punitive* damages in Title II, as it did in Title III, reflects its intent not to foreclose them in appropriate cases under Title II.

Petitioners, backed by the Solicitor General, seek to find support for their contrary view of congressional intent by pointing to the amendment of the remedial provisions of Title I of the ADA in the Civil Rights Act of 1991. In that legislation, Congress for the first time provided for compensatory and punitive damages, subject to a cap of $300,000, in employment discrimination actions against nongovernmental employers under Title VII of the Civil Rights Act of 1964, Section 501 of the Rehabilitation Act, and Title I of the ADA. *See* 42 U.S.C. § 1981a(a) & (b). Petitioners and the Solicitor General observe that this legislation was intended to "expand" the remedies available under the ADA and the Rehabilitation Act, and they argue that if uncapped punitive damages were already available under Title II of the ADA

and/or Section 505(a) of the Rehabilitation Act, the provisions of the 1991 Act would not have "expanded" the available remedies, but would actually have limited them.

This argument reflects a fundamental misunderstanding of the differences between the remedial scheme for employment discrimination under Title I of the ADA and the remedies for discriminatory denials of access to public services under Title II of the Act. As originally enacted in 1990, Title I adopted the expressly limited employment discrimination remedies of Title VII of the Civil Rights Act, under which a successful plaintiff could obtain only equitable remedies such as reinstatement, other injunctive relief, backpay, and "frontpay." *See* ADA § 107(a), 42 U.S.C. § 12117(a) (incorporating Title VII remedies); *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 847-48 (2001). Title VII specifically did "not allow awards for compensatory or punitive damages." *United States v. Burke*, 504 U.S. at 238; *see also Pollard*, 532 U.S. at 847-48, 851; *Landgraf v. USI Film Products*, 511 U.S. at 285 n.38.

The expressly limited Title VII remedial scheme adopted in Title I of the ADA thus contrasted sharply with the "common-law tradition of broad tort damages and the existence of other federal antidiscrimination statutes offering similarly broad remedies." *United States v. Burke*, 504 U.S. at 241. As *Franklin* confirmed, Title II of the ADA, like the statutes whose remedial scheme it adopted (Section 504, Title VI, and Title IX) fall into the category of federal antidiscrimination statutes offering broad remedies similar to those available under the common-law tradition. Indeed, *Franklin* roundly rejected the government's suggestion that remedial limits similar to those of Title VII should be read into these statutes. There, the Court stated (503 U.S. at 75):

> Finally, the United States asserts that the remedies permissible under Title IX should nevertheless be limited to backpay and prospective relief. In addition to diverging from our traditional approach to deciding what

remedies are available for violation of a federal right, this position conflicts with sound logic.

Grasping the fundamental differences between, on the one hand, the Title VII remedial model as originally adopted by Title I of the ADA in 1990 and, on the other hand, the Title VI-Title IX-Section 504 model incorporated in Title II of the ADA is essential to understanding why the "expansion" of the *employment discrimination* remedies in the 1991 Civil Rights Act is irrelevant to the scope of the remedies available under Title II. As this Court has explained, the 1991 Act "expanded the remedies available to [employment discrimination] plaintiffs by permitting, for the first time, the recovery of compensatory and punitive damages." *Pollard*, 532 U.S. at 848.[7] Before the 1991 Act, the statutes expressly ruled out awards of compensatory and punitive damages for most employment discrimination plaintiffs; after the passage of the Act, such damages (subject to the statutory caps) were available to employment discrimination plaintiffs under Title VII, Title I of the ADA, and Section 501 of the Rehabilitation Act. That was plainly an "expansion" of the available remedies for employment discrimination, *regardless* of whether punitive damages were already potentially available for violations of Title II of the ADA. That Congress chose in 1991 to expand the "circumscribed remedies" (*Landgraf*, 511 U.S. at 285 n.38) that were previously available for employment

[7] *See also Pollard*, 532 U.S. at 851 ("In 1991, ... Congress further expanded the remedies available in cases of intentional employment discrimination to include compensatory and punitive damages."); *Landgraf*, 511 U.S. at 253-55 ("[The 1991 Act] significantly expands the monetary relief potentially available to plaintiffs who would [only] have been entitled to backpay under prior law. ... In short, ... the 1991 Act effects a major expansion in the relief available to victims of employment discrimination."); *United States v. Burke*, 504 U.S. at 241 n.12 ("Congress' decision to permit jury trials and compensatory and punitive damages under the amended Act signals a marked change in its conception of the injury redressable under Title VII ....").

discrimination under the ADA does not support an inference that the remedies under Title II were ever similarly circumscribed, nor does it suggest any intention to limit the remedies already available under Title II.

Indeed, the framers of the 1991 Act were careful *not* to limit punitive damages remedies that already existed under the civil rights laws. Under 42 U.S.C. § 1981, punitive damages were already available to civil rights plaintiffs who could prove that prospective employers had refused to enter into contracts with them on account of race. *See Patterson v. McLean Credit Union*, 491 U.S. 164, 171-75, 181-82 (1989) (reaffirming *Runyon v. McCrary*, 427 U.S. 160 (1976)); *Johnson v. Railway Express Agency*, 421 U.S. at 460 (holding punitive damages available for employment discrimination under § 1981). The 1991 Act, even while capping the punitive damages potentially available under Title VII, expressly provided that "[n]othing in this section shall be construed to limit the scope of, or the relief available under, section 1981 of this title." 42 U.S.C. § 1981a(b)(4). Thus, as this Court explained in *Pollard*:

> [Before 1991,] 42 U.S.C. § 1981 permitted the recovery of unlimited compensatory and punitive damages in cases of intentional race and ethnic discrimination, but no similar remedy existed in cases of intentional sex, religious, or disability discrimination. Thus, [the 1991 Act] brought all forms of intentional employment discrimination into alignment, at least with respect to the forms of relief available to successful plaintiffs. However, compensatory and punitive damages awarded under § 1981a may not exceed the statutory limitations set forth in § 1981a(b)(3), while such damages awarded under § 1981 are not limited by statute.

532 U.S. at 851. More broadly, *Pollard* emphasized that the new damages remedies created by 42 U.S.C. § 1981a were all "*in addition*" to remedies already available (*id.* at 852), and

were not intended to limit relief that could be awarded before 1991. *Id.* at 854.

In the final analysis, then, the real significance of the 1991 Act to this case is twofold: First, the Act was not intended to eliminate or limit the scope of remedies that were already available under the ADA or other civil rights legislation. The 1991 Act therefore cannot be construed as affecting the availability of punitive damages under Title II of the ADA. Second, like the exclusion of punitive damages under Title III of the ADA, 42 U.S.C. § 1981a demonstrates that when Congress intended to deny or limit punitive damages when creating a damages remedy under the ADA and related statutes, it did so expressly. Because Congress did not impose any such limitation on the damages relief available under Title II, this Court should not take it upon itself to do so.

C. The Punitive Damages Remedy Serves the Policies of Title II and Section 504.

A punitive damages remedy in appropriate cases is fully consistent with the policies underlying both Title II of the ADA and Section 504 of the Rehabilitation Act. The ADA reflects an ambitious and far-reaching policy "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities," and, to achieve that purpose, "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1) & (2); *see also Martin*, 532 U.S. at 674-75.

Critical to the goal of eliminating discrimination against people with disabilities is the provision of remedies to achieve that end. The Committee Reports on the Act observed that "the rights guaranteed by the ADA are meaningless without effective enforcement provisions," and that "attempts to weaken the remedies available under the ADA would make the ADA an 'empty promise of equality.'" H.R. Rep. No. 101-485(II), at 40 (1990); *see also* S. Rep. No. 101-116, at 15 (1989). The House Report noted the "poor enforcement of existing federal disability rights legislation" (*i.e.*, Section 504), H.R. Rep. No. 101-485(II), at 40, and the Senate Report characterized existing federal laws as "inadequate." S. Rep. No. 101-116, at 18. In the words of one witness cited in the House Report, "There has not been enough compliance with the 504 regulations. ... It is not enough to just have it down on the books." H.R. Rep. No. 101-485(II), at 40. Illinois Attorney General Neil Hartigan, in testimony cited in the Senate Report, summed up the rationale for strong remedies: "The whole trick is to make it more expensive to break the law than it is to keep the law." S. Rep. No. 101-116, at 15.

Punitive damages advance the ADA's policy of eliminating discrimination against people with disabilities by doing just that: making it more expensive to violate the Act than to comply with it. As this Court has recently observed, punitive damages are by nature extremely well adapted to this end. "[P]unitive damages ... serve an obvious public function in deterring future violations," and they "may often have a greater impact on ... behavior ... than the threat of an injunction." *EEOC v. Waffle House, Inc.*, 122 S. Ct. 754, 764-65 (2002).

Petitioners and the Solicitor General largely ignore the congruence between the policies and purposes of the ADA and the availability of punitive damages for violations of Title II of the Act. Instead, they focus on the Rehabilitation Act and contend that an award of punitive damages for a violation of Section 504 is inconsistent with the scheme of federal enforcement under the Act—in particular, with the availability of a federal funding cutoff as a penalty for aggravated violations of Section 504.[8] A punitive damages remedy, they

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[8] Petitioners and the Solicitor General note that there are federal enforcement regulations under the ADA as well as the Rehabilitation Act, but they do not point to any particular enforcement mechanism under the

(*Footnote continued*)

contend, would displace this carefully wrought enforcement system and impose penalties more severe than the funding cutoff that, they argue, is in effect the "statutory maximum."

Concerns about the possible disproportionality between punitive damages and the funding cutoff remedy, however, have no application to Title II of the ADA. Because Title II is not limited to federally funded activities, its remedies need hardly be measured against the irrelevant enforcement mechanism of a cutoff of federal funds. Moreover, any concern that punitive damages might frustrate the purposes of the Rehabilitation Act by leading potential funding recipients to forgo federal financial assistance that might benefit people with disabilities clearly does not extend to punitive damages awards under Title II. An entity subject to Title II could derive no benefit from declining to accept federal funds, because doing so would not insulate it from Title II's proscriptions or remedies. Allowing the broad remedial and deterrent goals of the ADA to be limited by concerns that apply only to the narrower scope of the Rehabilitation Act would be a classic case of the tail wagging the dog.

Moreover, even as applied to Section 504, petitioners' theory is nothing more than an attempt to resurrect an argument that the Court disposed of over 20 years ago in *Cannon*. There, the defendant argued that permitting a private right of action under Title IX would be inconsistent with federal enforcement of Title IX through the withdrawal of funding from noncompliant programs. This Court rejected the argument for a number of reasons. The Court emphasized that the purpose of the statute was not only to prevent federal funding of discrimination, but also, more broadly, to protect citizens

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ADA regulations that is inconsistent with a punitive damages remedy. Petitioners contend that a punitive damages remedy will allow them to be punished for violations of what they call "housekeeping" regulations, but they do not explain how the knowing violation of critical substantive regulations at issue here was merely a matter of "housekeeping."

from discrimination—a goal that private enforcement would advance. 441 U.S. at 704. In addition, the Court recognized that federal enforcers have limited resources and that permitting private remedies allows pursuit of violations that federal agencies may not even be able to investigate. *Id.* at 707 n.41. Perhaps most significantly, the Court pointed out that a funding cutoff is a severe, "last resort" remedy that enforcers will be loath to use except in the most extreme cases. *Id.* at 704-05 & nn. 38-39. Given the limited efficacy of this remedy, the Court concluded that private remedies, far from interfering with federal enforcement, would advance the statutory purpose of combating discrimination. *Id.* at 704-08.[9]

Seven of the nine Justices of this Court who participated in the *Guardians* decision four years after *Cannon* reached the same conclusion. Justice White's lead opinion, joined by Justice Rehnquist, concluded that the existence of a private right of action (including monetary remedies for intentional violations) was not inconsistent with the statutory funding cutoff sanction under Title VI. *See Guardians*, 463 U.S. at 593-94, 597. Justice Marshall's opinion succinctly stated the reasons private remedies can, and indeed must, coexist with the defunding mechanism:

> Private retrospective relief also constitutes a 'necessary supplement' to the administrative enforcement mechanism contained in Title VI. ... The statutory sanction of a fund cutoff cannot sufficiently ensure general compliance with the command of Title VI, because the sheer quantity of federal financial assistance programs makes Government enforcement alone impractical and because a fund cutoff is too Draconian to be widely used. Retrospective liability for Title VI violations comple-

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[9] Despite their focus on the importance of the funding cutoff remedy, neither petitioners nor the Solicitor General contest *Cannon*'s point that the remedy is so rarely used as to be largely ineffective.

ments administrative enforcement by providing a more realistic deterrent against unlawful behavior.

Id. at 626-27 (Marshall, J., dissenting). Similarly, Part I of Justice Stevens' opinion, which Justices Brennan and Blackmun joined, and with which Justice O'Connor agreed (*see id.* at 612 (O'Connor, J., concurring in the judgment)), concluded that the funding cutoff mechanism did not preclude private remedies under Title VI, including retrospective relief. *Id.* at 638-39.

Petitioners contend, however, that punitive damages are different from other damages because awards of punitive damages may exceed the amount of federal financial assistance a funding recipient receives, rendering the relief even more draconian than a funding cutoff. The argument, however, proves both too much and too little. Too much, because in some cases, even a compensatory damages award could exceed the amount of financial assistance a defendant receives, *see Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 290 (1998), yet compensatory damages are available under Spending Clause measures despite the existence of the federal funding cutoff enforcement mechanism. *See Davis v. Monroe County Board of Education*, 526 U.S. 629, 640-41 (1999); *Franklin*, 503 U.S. at 74-75. Too little, because in the great majority of cases a damages award, whether compensatory or punitive, will likely not approach the amount of money a funding recipient receives from the federal government over time. *See Guardians*, 463 U.S. at 601 ("an award of damages would not be as drastic a remedy as a cutoff of funds") (opinion of White, J.); *id.* at 638-39 n.7 ("[T]he record in this case gives no basis for thinking that the cost of an appropriate award of damages to the petitioners would exceed the total amount of respondents' federal subsidy. And, as a general proposition, it is usually assumed that a cutoff of federal funds would be significantly more drastic than an individualized remedy for the victim of a Title VI violation.") (Stevens, J., dissenting).

The enormous and unlawful financial windfall gained in this case by Kansas City over its many years of noncompliance with Title II and Section 504, coupled with the likelihood that in most cases damages awards will be far smaller than the federal financial assistance received by the defendants, renders irrelevant petitioners' repeated complaint that defendants in general, and local governments in particular, will not be able to withstand purportedly unchecked jury awards of punitive damages. That concern is hardly substantiated here given the approximately one-to-one ratio of compensatory to punitive damages, the gravity of the misconduct Mr. Gorman endured, and the evidence of petitioners' long history of knowing disregard of federal law. In any event, the district court has not yet determined whether the award of punitive damages in this case was "appropriate" under *Franklin*, including whether petitioners' conduct reflected "reckless or callous indifference to the federally protected rights of others," Pet. App. 16a (quoting *Smith v. Wade*, 461 U.S. at 56), and whether the amount awarded satisfied constitutional standards of proportionality.[10]

III. PETITIONERS' EFFORTS TO TAKE THIS CASE OUTSIDE THE *FRANKLIN* FRAMEWORK ARE UNAVAILING.

A. The *Franklin* Presumption Does Not Exclude Punitive Damages.

Petitioners and the Solicitor General argue that punitive damages do not fall within *Franklin*'s presumption in favor of the availability of "any appropriate relief." Rather, they

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[10] This Court therefore need not consider whether, in a proper case, an award of punitive damages might be limited by consideration of the amount of federal financial assistance received by a defendant and/or the financial gain reaped by the defendant through noncompliance with federal law. *Cf. TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 461-62 (1993) (opinion of Stevens, J.) (considering wrongdoer's potential gain in assessing propriety of punitive damages award).

assert, *Franklin* rested on case law concerning the availability of "remedial" relief for the redress of injuries—a category that, they say, includes compensatory damages but not punitive damages, whose function is not to make the victim whole but to penalize and deter misconduct.

The argument that punitive damages are not "remedies" within the meaning of *Franklin*, however, flies in the face of a host of decisions of this Court. In *Carlson v. Green*, for example, this Court expressly referred to punitive damages as a "remedial mechanism," 446 U.S. at 22, and as an element of a "remedial scheme." *Id.* at 22 n.10. The Court used the same terms to refer to punitive damages in *Silkwood*, which held that preemption of state-law "remedies," specifically including punitive damages, would not be presumed absent clear evidence of congressional intent. 464 U.S. at 255.

Moreover, in *Smith v. Wade*, the Court rejected precisely the argument now advanced by petitioners and the United States. There, the Court held that punitive damages are available under Section 1983 even though Section 1983 does not expressly authorize punitive damages, but provides only that defendants may be held "liable to the party injured in an action at law, suit in equity, or other proper proceeding for *redress*." 42 U.S.C. § 1983 (emphasis added). The Court flatly rejected the proposition that the use of the term foreclosed availability of punitive damages. 461 U.S. at 36 n.5.

Likewise, the Solicitor General errs in contending that this Court's decision in *Carey v. Piphus*, 435 U.S. 247, erected a general "compensation principle" that disfavors punitive damages in actions based on violations of federal rights. *Carey v. Piphus* rejected an award of damages that purported to provide compensation for purely abstract injuries; but the opinion expressly acknowledged that the principle that compensatory damages must be measured and limited by actual injuries is not incompatible with the award of punitive damages for violations of federal statutory and constitutional rights "in a proper case." 435 U.S. at 257 n.11. In-

deed, *Smith v. Wade* relied in part on *Carey v. Piphus* in holding punitive damages available in Section 1983 actions. 461 U.S. at 36 n.5.

Even more remarkable is the Solicitor General's argument that the reasoning of *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), limits relief in implied rights of action to compensatory damages because only such damages are necessary to provide a remedy to plaintiffs for whom, in Justice Harlan's famous words, "it is damages or nothing." 403 U.S. at 410 (Harlan, J., concurring). If the Solicitor General's reading of *Bivens* were correct, punitive damages would be unavailable in *Bivens* actions—but as *Carlson v. Green* teaches, *Bivens* permits punitive damages. 446 U.S. at 22. Thus, the Solicitor General's *Bivens* example disproves his point.

Petitioners' related point that *Franklin* does not support an award of punitive damages because barring such damages would not leave Mr. Gorman without a remedy is similarly meritless. *Franklin* itself made clear that the availability of one remedy does not depend on all other remedies being futile. Thus, the *Franklin* Court rejected the argument that damages were permissible under Title IX only where equitable relief was inadequate. *See* 503 U.S. at 75-76.

Equally unpersuasive is the Solicitor General's argument that *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, erected a presumption against the availability of punitive damages in implied statutory rights of action. The majority opinion in *Foust* neither mentions such a presumption nor purports to announce any general principles concerning the circumstances under which punitive damages should be available in implied statutory rights of action. Instead, the *Foust* majority's rejection of punitive damages awards against labor unions in implied rights of action for breach of the duty of fair representation rested on the Court's analysis of factors particular to the field of labor relations—considerations that, in the majority's view, compellingly

demonstrated that Congress did not intend to provide such a remedy. Thus, the Court emphasized that "the threat of punitive damages could disrupt the responsible decisionmaking essential to peaceful labor relations," 442 U.S. at 51-52, and rejected their availability "[b]ecause general labor policy disfavors punishment." *Id.* at 52. Only in this specific factual context did the majority state that it would not permit punitive damages without "clear congressional guidance." *Id.*

Unlike the majority opinion in *Foust*, the concurring opinion, written by Justice Blackmun and joined by Chief Justice Burger and Justices Rehnquist and Stevens, did discuss the general principles governing the availability of remedies in general—and punitive damages in particular—in implied rights of action. Justice Blackmun's opinion anticipated the majority's approach in *Franklin* by asserting that, in a cause of action properly before it, a federal court "has at its disposal the full panoply of tools traditionally used by courts to do justice between parties." 442 U.S. at 53 (Blackmun, J., concurring in the result). "Punitive damages," Justice Blackmun continued, "being one of these tools, thus are presumptively available for use in appropriate cases, unless Congress has directed otherwise." *Id.* Four years later, in *Silkwood*, the Court expressly adopted this aspect of Justice Blackmun's *Foust* concurrence in holding that the burden is on a party opposing punitive damages "to show that Congress intended to preclude such awards." 464 U.S. at 255 (citing *Foust*, 442 U.S. at 53 (Blackmun, J., concurring in the result)).[11]

[11] Adoption of the Solicitor General's new presumption *against* punitive damages where Congress creates a right of action but does not specify the relief available would have far-reaching consequences beyond this case. The lower courts have broadly agreed that the *Franklin* presumption applies to punitive damages not only under civil rights legislation such as Title VI, Title IX, Title II of the ADA, and Section 504, but under a range of other statutes as well. *See, e.g., Reich v. Cambridgeport Air Sys., Inc.*, 26 F.3d 1187 (1st Cir. 1994) (Occupational Safety and (*Footnote continued*)

The Solicitor General further contends that decisions refusing to recognize the *existence* of rights of action, such as *Alexander v. Sandoval*, 532 U.S. 275 (2001), and *Correctional Services Corp. v. Malesko*, 122 S. Ct. 515 (2001), support a narrow construction of the relief available where Congress provides a right of action, assertedly because "separation of powers" concerns cast doubt on the legitimacy of judicial recognition of forms of relief not expressly provided for by statute. The Solicitor General's argument is at odds with *Franklin*, which rejected precisely the same argument.

In *Franklin*, as here, the Solicitor General argued that the Court's refusal to recognize implied rights of action for violations of some statutory rights reflected abandonment of the presumption in favor of any appropriate relief where a right of action is available. The Court stated unequivocally that the government's position reflected a fundamental "misunderstanding over the difference between a cause of action and the relief afforded under it." *Franklin*, 503 U.S. at 69. The Court further explained that "[u]nlike the finding of a cause of action, which authorizes a court to hear a case or controversy, the discretion to award appropriate relief involves no ... increase in judicial power," *id.* at 73-74, and hence poses no threat to separation of powers principles. Indeed, the Court stated, separation of powers principles would be undermined more by judicial abdication of the power to award traditionally available remedies than by exercise of that authority. *Id.* at 74.

Health Act); *Lebow v. American Trans Air*, 86 F.3d 661 (7th Cir. 1986) (Railway Labor Act); *Beckett v. Atlas Air, Inc.*, 968 F. Supp. 814 (E.D.N.Y. 1997) (Railway Labor Act); *Oldroyd v. Elmira Sav. Bank*, 956 F. Supp. 393 (W.D.N.Y. 1997) (FIRREA), *vacated in part on other grounds*, 134 F.3d 72 (2d Cir. 1998); *Burns-Vidlak v. Chandler*, 980 F. Supp 1144 (D. Haw. 1997) (ADA Title II and Section 504; citing cases), *app. dism'd*, 165 F.3d 1257 (9th Cir. 1999); *Canty v. Old Rochester Regional School Dist.*, 54 F. Supp. 2d 66 (D. Mass. 1999) (Title IX).

B. The *Franklin* Presumption Applies to Section 505 of the Rehabilitation Act.

Notwithstanding that *Franklin*'s presumption in favor of any appropriate relief is generally applicable to punitive damages, petitioners (but not the Solicitor General) argue that the presumption is specifically inapplicable to the right of action created by Section 505(a) of the Rehabilitation Act, and, by extension, to Title II of the ADA. Petitioners contend that this Court so held in *Lane v. Peña*, 518 U.S. 187 (1996), but their argument tears language from that opinion out of its context and distorts the holding of the Court.

The issue in *Lane* was whether, in creating a right of action for monetary damages for violations of Section 504 of the Rehabilitation Act, Section 505(a)(2) constituted a sufficiently unambiguous waiver of the sovereign immunity of the United States to permit actions for damages against federal agencies alleged to have violated Section 504 directly in the conduct of their activities. The Court held that such actions were barred by sovereign immunity because Section 505(a)(2) expressly provided for remedies only against federal agencies acting in their capacities as "provider[s] of [Federal financial] assistance" and did not explicitly create a right of action against federal agencies that directly conducted programs or activities. *See* 518 U.S. at 192-93. *Lane*'s holding that Section 505(a)(2) did not provide a *cause of action* against a federal agency acting as a direct provider of government services has no bearing on the issue here, as it is undisputed that both the ADA and the Rehabilitation Act provide a cause of action against petitioners.

To be sure, in arriving at its holding, *Lane* rejected the argument that the *Franklin* presumption supported a damages claim *against the federal government* under Section 505(a)(2), for two reasons. First, the requirement that waivers of the sovereign immunity of the United States be express precluded resort to *Franklin*'s presumption about the availability of remedies not expressly provided. 518 U.S. at 196.

Second, the Court noted that Section 505(a)(2) *expressly* addresses the issue of what entities it authorizes remedies against, yet *omits* federal agencies except when acting as funding providers. *Id.* at 196. By expressly addressing that particular issue, the Court held, Section 505(a)(2) rendered the *Franklin* principle inapplicable to the specific question presented in *Lane*: whether damages were available against federal agencies not acting as funding providers. *Id.*

In holding that Section 505(a)(2)'s specificity about *who* was amenable to suit took "*this case* outside the 'general rule' we discussed in *Franklin*," *id.* (emphasis added), the Court did not, as petitioners suggest, hold that the *Franklin* presumption was altogether inapplicable to remedies under Section 505(a)(2). Such a holding would have made no sense, for although Section 505(a)(2) specifically addresses *who* is subject to the remedies it authorizes, it does not specifically delineate the *scope* of the relief available against those entities. Instead, it incorporates the remedies that are *impliedly* available under Title VI, to which the *Franklin* presumption applies. *See Franklin*, 503 U.S. at 70.[12] Thus, the *Franklin* presumption also necessarily controls the scope of the relief available under Section 505(a), and, therefore, under Title II of the ADA.

C. Spending Clause Concerns Do Not Limit the Relief Available under Title II or Section 504.

Petitioners and the Solicitor General further contend that, regardless of whether the conventional *Franklin* presumption in favor of any appropriate relief would otherwise permit the award of punitive damages for violations of Title II and Section 504, the Spending Clause concerns articulated in *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, and

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[12] The one exception to this lack of specificity is that Section 505 expressly provides for attorney's fees in addition to whatever other remedies are available. *See* 29 U.S.C. § 794a(b).

Pennhurst State School & Hospital v. Halderman, 451 U.S. 1 (1981), limit the relief available even for intentional violations of the Rehabilitation Act and preclude imposition of punitive damages under it. Although they acknowledge that the ADA is not a Spending Clause enactment, they further contend that because Title II adopts the remedies of Section 505(a) of the Rehabilitation Act, it is also subject to Spending Clause-based limits on remedies. Neither part of the petitioners' argument withstands scrutiny.

Gebser provides no support for the view that the Spending Clause limits the relief available for intentional civil rights violations to remedies expressly defined by statute, and, indeed, other decisions of the Court expressly reject that theory. In *Gebser*, this Court, following such prior decisions as *Pennhurst* and *Guardians*, held that a defendant subject to the constraints imposed by Title IX only because of its receipt of federal funds may not be held liable for damages solely because of *conduct* that it did not know (and indeed, could not have known) would place it in violation of Title IX's prohibitions. *See* 524 U.S. at 287-90. As this Court explained the following year in *Davis v. Monroe County Board of Education*, 526 U.S. at 640, the essential teaching of *Gebser*, as well as *Pennhurst* and *Guardians*, on which *Gebser* is based, is that under Spending Clause legislation, "private damages actions are available only where recipients of federal funding had adequate notice that they could be held liable *for the conduct at issue*" (emphasis added). *Davis* went on to hold that where the defendant did have such notice (as where it intentionally engaged in the unlawful conduct at issue or was aware of and deliberately indifferent to it), the defendant may be subjected to the full range of appropriate relief available under *Franklin*. *Id.* at 642-43.[13]

[13] *Davis* and *Franklin*, which recognized tort-like damages remedies for violations of Spending Clause measures, also refute petitioners' argu-

(*Footnote continued*)

The *Gebser* limit on the *type of conduct* for which defendants may be held liable under Spending Clause legislation thus offers no support for the argument that the Spending Clause also limits the *form of relief* available for conduct, such as that in this case, that meets the standard for liability. Indeed, this Court expressly held in *Franklin* that the Spending Clause principles articulated in *Pennhurst* (of which *Gebser* is only the most recent application) did *not* limit the relief available for intentional violations of Spending Clause-based civil rights legislation. As *Franklin* stated:

> In *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 28-29 (1981), the Court observed that remedies were limited under such Spending Clause statutes when the alleged violation was *unintentional*. Respondents and the United States maintain that this presumption should apply equally to *intentional* violations. We disagree. The point of not permitting monetary damages for an unintentional violation is that the receiving entity of federal funds lacks notice that it will be liable for a monetary award. See *id.*, at 17. This problem does not arise in a case such as this, in which intentional discrimination is alleged.

503 U.S. at 74-75 (emphasis in original). The Spending Clause concerns animating *Gebser* and *Pennhurst* thus provide no support for curtailing the remedies available in cases involving intentional civil rights violations such as those in this case.[14] *Gebser*'s reservation of some judicial discretion concerning the scope of implied remedies permits courts to define the *circumstances* under which particular remedies are

ment that only "contract" remedies are available for violations of Spending Clause statutes.

[14] Neither petitioners nor the Solicitor General suggest that the *Gebser* standard of liability (assuming its applicability to Title II, a non-Spending Clause measure) was not satisfied in this case. Indeed, that issue is not even before this Court.

available, but not to exclude categorically particular forms of relief.

Petitioners' attempt to transform *Gebser* from a requirement of clear notice of the type of conduct that will give rise to liability into a requirement that Congress clearly specify the types of relief to which a funding recipient will be subject for intentional violations would have vast consequences. Taken seriously, it would require the Court to overturn the entire body of case law, beginning with *Cannon*, running through *Guardians* and *Darrone*, and culminating in *Franklin* and *Davis*, that recognizes rights of action for injunctive and monetary relief under Title VI, Title IX, and Section 504. Since, in all those cases, the remedies were implied rather than expressly provided for in the statute, in none of the cases could it be said that the funding recipient was clearly on notice that its conduct would subject it to the particular relief at issue. Indeed, petitioners acknowledge that their position on the Spending Clause is inconsistent with this Court's recognition of private rights of action under Spending Clause legislation. Pet. Br. 18. Nonetheless, they argue that the Court should draw the line at punitive damages—but they advance no principled distinction from the standpoint of the Spending Clause between that relief and the remedies the Court has already permitted. Their inability to provide a coherent justification for their proposed transformation of the *Gebser* principle dooms their argument.

Even if petitioners' Spending Clause analysis were persuasive with respect to the availability of punitive damages for violations of Section 504 of the Rehabilitation Act, it would remain irrelevant to whether punitive damages are available under Title II of the ADA. Whatever limits the Spending Clause may place on relief under statutes passed on its authority, there is no basis for importing those constitutional limits into the ADA, a statutory scheme based on sources of authority to which limits on the spending power are irrelevant. Title II is indisputably not Spending Clause

legislation: Its provisions apply regardless of whether a public entity or program receives federal funding, and the enacting Congress expressly "invoke[d] the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce." 42 U.S.C. § 12101(b)(4). As the Court recognized in *Gebser*, Spending Clause constraints have no application to such legislation, which "applies … without regard to federal funding" and "is framed in terms not of a condition [on funding] but of an outright prohibition." 524 U.S. at 286. Where, as here, Congress has invoked its full authority and has acted broadly to outlaw discrimination and provide its victims with a full panoply of remedies, *Gebser*'s Spending Clause concerns have no bearing on the scope of relief available. To hold otherwise would allow Congress' invocation of multiple powers in different statutes to drag the level of remedies down to those supported by the least potent power invoked in the narrowest statute.

Although they recognize that Title II of the ADA has nothing to do with the Spending Clause, petitioners contend that because Title II adopts the Rehabilitation Act's remedial scheme, relief under Title II must also be subject to Spending Clause limits. Petitioners bury this crucial link in the chain of their argument in a footnote that cites no authority. *See* Pet. Br. 21 n.13. Even if the Spending Clause does limit the forms of relief under Section 505(a)(2) of the Rehabilitation Act, petitioners' argument is unpersuasive. Petitioners do not suggest that the remedial limit that they purport to derive from *Gebser* is grounded in the *text* of Section 505(a)(2). Rather, they contend that the limit is imposed on the statute by the Constitution. Even if a Spending Clause limitation were superimposed on the remedies otherwise available under the terms of Section 505(a)(2), however, that would not mean that Congress intended to adopt that limitation when it incorporated the terms of Section 505(a)(2) into legislation based on constitutional powers that are not even arguably subject to a similar limitation. *See Garcia v. S.U.N.Y. Health Sciences*

Center of Brooklyn, 280 F.3d 98, 113, 115 (2d Cir. 2001) (different constitutional constraints may be applicable to remedies under Title II and the Rehabilitation Act because of the different constitutional powers pursuant to which they were enacted).[15]

In fact, there are compelling reasons to believe that Congress could not have imported Spending Clause-based limits on relief (assuming for the sake of argument that they exist) into Title II of the ADA. First, such limits are inconsistent both with the "sweeping" and "expansive" purpose of the ADA (*Martin*, 532 U.S. at 675, 680) and with Congress' explicit intent to provide the full panoply of remedies to Title II plaintiffs. Second, Congress could not possibly have intended to incorporate all the limits on the Rehabilitation Act's Section 505(a)(2) remedies into Title II of the ADA. Section 505(a)(2), by its express terms, provides remedies only against funding recipients and federal funding agencies—a scope generally commensurate with the limits on Section 504's substantive reach and with the extent of congressional Spending Clause power. In adopting Section 505(a)(2)'s remedies to enforce the broader proscriptions of Title II of the ADA, which are in no way limited to programs that receive federal funds, Congress obviously did not intend to limit remedies under Title II to funding recipients or funding agencies. That limitation would have made no sense, and

[15] Although the Solicitor General agrees with petitioners that the Spending Clause limits the relief available for violations of Section 504 and that the same limits apply to Title II, the United States has previously taken the position that Spending Clause remedial limits do *not* apply to Title II. *See Tyler v. City of Manhattan*, 118 F.3d 1400, 1403 (10th Cir. 1997). The majority in *Tyler* did not address this argument because it was raised only by the United States as amicus curiae, and not by a party to the case. *Id.* The third member of the panel, Judge Jenkins, dissented from the majority's decision not to reach the issue and explained at length why Spending Clause limits were inapplicable to the remedy provided in Title II of the ADA. 118 F.3d at 1404-16 (Jenkins, J., dissenting).

would have rendered Title II, for practical purposes, entirely redundant of Section 504. Congress must have contemplated, when it adopted Section 505(a)(2)'s remedies in Section 203 of the ADA, that the Title II remedy would go further than would be permissible under a Spending Clause enactment.

IV. THE *NEWPORT v. FACT CONCERTS* DOCTRINE DOES NOT BAR PUNITIVE DAMAGES HERE.

A. The *Newport* Issue Was Neither Raised Nor Decided Below, and This Court Should Not Address It in the First Instance.

Petitioners and the Solicitor General argue, somewhat halfheartedly, that whatever the general rule on the availability of punitive damages under Title II of the ADA and Section 504 of the Rehabilitation Act may be, punitive damages should not be available against petitioners under the principles of *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), because, as members of a Board of Police Commissioners sued in their official capacity, petitioners are a "municipality." Pet. Br. 23-25; U.S. Br. 31-32. Although one might have assumed from the phrasing of petitioners' question presented ("[w]hether punitive damages may be awarded against a municipal government ...") that the *Newport* point would be their principal argument, their failure to emphasize the issue now is readily explained by their failure to present it in any manner to the courts below. As an issue neither argued nor decided in either the district court or the court of appeals, it is not properly before this Court.

In the district court and the court of appeals, petitioners' principal argument was that punitive damages were not available against *any* defendant under Title II and Section 504. Their briefs in the court of appeals did not so much as cite *Newport*. In the lower courts, petitioners did not even acknowledge that they *were* a municipality. On the contrary, they contended that they were an instrumentality of the State of Missouri, and they argued not for exemption from punitive

damages under *Newport*, but for Eleventh Amendment immunity from *any* action for damages (an argument the Eighth Circuit rejected on the strength of this Court's opinion in *Auer v. Robbins*, 519 U.S. 452 (1997)).[16] Not until their petition for certiorari did petitioners argue that, as a municipality, they could not be subjected to punitive damages under the *Newport* rationale—an entirely different argument from the Eleventh Amendment argument advanced below.

It is a long-established principle that this Court will not address arguments neither presented nor decided below. *See, e.g., TRW, Inc. v. Andrews*, 122 S. Ct. 441, 451 (2002). The Court applied this rule in circumstances very similar to those presented here in *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206 (1998). That case presented the statutory question whether Title II of the ADA applied to the programs offered by state prison systems. In this Court, the petitioner sought to argue for the first time a related but different issue: Whether the application of Title II to State governments was a proper exercise of Congress' constitutional powers. Although that issue had a direct bearing on whether the petitioner was even amenable to suit under the Eleventh Amendment, the Court declined to reach it (*id.* at 212-13):

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[16] Even had petitioners established that they were part of the State, their claim of immunity would have had to contend with the statutory abrogation of sovereign immunity in both the ADA and the Rehabilitation Act. 42 U.S.C. § 12202; 42 U.S.C. § 2000d-7. Their strategic decision to argue for State status and Eleventh Amendment immunity, however, was driven by the fact that the Eighth Circuit had already held that the ADA's abrogation of sovereign immunity is not valid for claims under Title II of the Act (an issue this Court declined to reach last Term in *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356, 360 n.1 (2001)). *See Alsbrook v. City of Maumelle*, 184 F.3d 999 (8th Cir. 1999). In light of the tenuousness of their claim to "Statehood" and this Court's very recent decision in *Garrett* dismissing the writ of certiorari as improvidently granted to the extent it raised the Eleventh Amendment issue under Title II, petitioners apparently decided the never-before-raised *Newport* issue had a better chance of interesting this Court.

> We do not address another issue presented by petitioners: whether application of the ADA to state prisons is a constitutional exercise of Congress's power under either the Commerce Clause ... or § 5 of the Fourteenth Amendment.... Petitioners raise this question in their brief, ... but it was addressed by neither the District Court nor the Court of Appeals, where petitioners raised only the *Gregory* plain-statement issue. "Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147, n. 2 (1970) (citations omitted). See also *Dothard v. Rawlinson*, 433 U.S. 321, 323, n. 1 (1977); *Duignan v. United States*, 274 U.S. 195, 200 (1927). We decline to do so here.

The same result should obtain here. Petitioners' failure to present the issue below has deprived this Court of the benefit of the lower courts' views on the question. Moreover, because the Eighth Circuit did not even implicitly decide the *Newport* issue, leaving its ruling intact will not establish or perpetuate a precedent one way or the other on the question.[17] Given petitioners' default and the lower courts' silence, there is no need for this Court to decide the issue.[18]

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[17] At least one district court in the Eighth Circuit has already held that the Eighth Circuit's decision in this case leaves open the question whether punitive damages may be imposed on a municipality. That court then went on to decide the issue adversely to the punitive damages claimant. *Schultzen v. Woodbury Central Community School District*, 2002 WL 262057 (D. Iowa Feb. 22, 2002).

[18] Ironically, in *Newport* itself, the Court had to consider whether the issue of municipal immunity from punitive damages had been waived by the city's failure to object to a jury instruction. This Court reached the issue, *but only because it had been presented to and decided by both the district court (in a motion for new trial) and the court of appeals*. 453 U.S. at 255-56; *accord, e.g., City of St. Louis v. Praprotnik*, 485 U.S. 112, 120 (1988) (reaching city's claim that municipal liability had not been

(*Footnote continued*)

B. The *Newport* Presumption Against Subjecting Governmental Entities to Punitive Damages Does Not Apply to Title II or Section 504.

In *Newport*, this Court held that municipal governments are "immune from punitive damages under 42 U.S.C. § 1983." 453 U.S. at 271. The "immunity" recognized by *Newport*, however, is unlike Eleventh Amendment immunity in that it is not constitutionally based and may be overcome by congressional enactment. As this Court recently explained, the doctrine is no more than a "presumption against imposition of punitive damages on governmental entities" (including both municipalities and States). *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 785 (2000). As such, the presumption is trumped by clearly expressed congressional intent. *Id.* at 787.

Here, a clear expression of congressional purpose exists not only in the form of Congress' stated intent in Title II to provide a "full panoply of remedies" against public entities (*see supra* pp. 11-13), but also, even more pointedly, in provisions applicable to both the ADA and the Rehabilitation Act that make clear Congress' intent *not* to provide governmental entities with a general immunity against the forms of remedies available against private actors.

The Rehabilitation Act Amendments of 1986 did more than simply attempt to abrogate State sovereign immunity against private actions brought to enforce Section 504 of the Rehabilitation Act. They went on to provide specifically that the full range of relief available against private defendants (as well as against public entities other than States) could be obtained in an action against a State:

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established despite arguable failure to make proper objection to jury instruction, where issue had been presented to and decided by both district court and court of appeals). Petitioners did not preserve the *Newport* issue here in a comparable manner—or in any manner.

> In a suit against a State for a violation of a statute referred to in paragraph (1) [including Section 504 of the Rehabilitation Act], remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.

42 U.S.C. § 2000d-7(a)(2). When Congress enacted the ADA in 1990, it included almost identical language in Section 502 of the Act (42 U.S.C. § 12202):

> In any action against a State for a violation of the requirements of this chapter, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

These provisions demonstrate Congress' intent to override any doctrines—such as the *Newport* rule—that might otherwise suggest that remedies available against a private defendant under the ADA or Section 504 of the Rehabilitation Act should be denied simply because a defendant is a government entity. And because (as demonstrated above) punitive damages are generally available for violations of Section 504 and Title II, both the Rehabilitation Act Amendments and the ADA unmistakably reflect congressional intent that punitive remedies also be available against governmental entities, thus directly overcoming the *Newport* presumption.[19]

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[19] The unsettled issue of the validity of the abrogation of Eleventh Amendment immunity for violations of Section 504 and Title II has no bearing on the significance of the relevant statutory provisions for present purposes. The only issue under *Newport* and *Vermont Agency* is whether Congress has manifested an intent to overcome the presumption that punitive damages are unavailable against governmental entities. Regardless of whether they suffice to overcome Eleventh Amendment immunity, 42 U.S.C. §§ 2000d-7 and 12202 are clear expressions of congressional in-

(*Footnote continued*)

Although 42 U.S.C. §§ 2000d-7(a)(2) and 12202 expressly provide only that *State* governmental entities are subject to the same remedies as private entities or other public entities (*see Lane v. Peña*, 518 U.S. at 199), the statutes dispel any presumption against the availability of punitive damages against municipalities as well, for two reasons. First, since *Vermont Agency* holds that the *Newport* presumption applies to both State and local governmental entities, by clearly subjecting State government entities to the full range of remedies, the statutes effectively overcome the *Newport* presumption that governmental entities in general have a special protection from punitive damages. Second, it would make no sense for Congress to subject States but not municipalities to punitive damages, because the legislative history of the ADA demonstrates that municipal governments have been the worst offenders in depriving people with disabilities of equal access to government services. *See Thompson v. Colorado*, 278 F.3d 1020, 1033 (10th Cir. 2001); *see also Garrett*, 531 U.S. at 391-424 (Breyer, J., dissenting) (cataloging history of discrimination by State and local governments compiled as part of ADA's legislative history).

Again, the contrast between the Title II remedy and the terms of the Civil Rights Act of 1991 helps to confirm that the presumption under the ADA is that governmental entities have no special exemption from available remedies unless Congress so specifies. In permitting, for the first time, awards of punitive damages for employment discrimination under Section 501 of the Rehabilitation Act and Title I of the ADA, the 1991 Act expressly exempted governmental entities. 42 U.S.C. § 1981a(b)(1). Congress' action reflects its understanding that, under 42 U.S.C. §§ 2000d-7(a)(2) & 12202,

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tent with respect to the availability of remedies against governmental entities. *See Garrett*, 531 U.S. at 363-64 (recognizing 42 U.S.C. § 12202 as an unequivocal expression of congressional intent); *Franklin*, 503 U.S. at 78 (Scalia, J., concurring in the judgment).

such awards would presumptively be available against government entities absent express language exempting them.

C. Public Policy Supports Awards of Punitive Damages Against Municipalities under Title II and Section 504.

Even where the *Newport* presumption would otherwise apply, it may be overcome if the public policy concerns underlying it are outweighed by other policy considerations indicating a need for a punitive damages remedy under the particular statutory scheme at issue. *See Newport*, 453 U.S. at 266. Here, those policy concerns strongly support the availability of punitive damages against municipal governments.

Newport recognized the important role that punitive damages under 42 U.S.C. § 1983 play in deterring official misconduct. 453 U.S. at 268. Critical to the Court's decision not to permit such damages against governmental entities was its view that the "more effective" deterrent was the availability under Section 1983 of punitive damages directly against the particular officials who engaged in misconduct. *Id.* at 270. As the Court stated, "By allowing juries and courts to assess punitive damages in appropriate circumstances against the offending official, based on his personal financial resources, the statute directly advances the public's interest in preventing repeated constitutional deprivations." *Id.* at 269; *see also Smith v. Wade*, 461 U.S. at 36 n.5 (emphasizing the importance of this rationale to the holding in *Newport*).

Given that both the ADA and the Rehabilitation Act are aimed at *eliminating* discrimination against people with disabilities in the provision of public services by State and local governments, the importance of deterrence under those statutes is at least as critical as it is under Section 1983. Unlike Section 1983, however, Title II of the ADA and Section 505(a)(2) of the Rehabilitation Act have been held not to provide remedies directly against offending officials in their personal capacities. *See Garcia v. S.U.N.Y. Health Sciences*

Center, 280 F.3d at 107 ("Insofar as Garcia is suing the individual defendants in their individual capacities, neither Title II nor § 504 of the Rehabilitation Act provides for individual capacity suits against state officials.") (collecting cases). Because the ostensibly "more effective" deterrent is apparently unavailable under Title II and Section 504, these statutes (unlike Section 1983, which was at issue in *Newport*) must depend for their deterrent effect on the remedies they provide directly against the entities to which they apply. Foreclosing punitive damages would materially interfere with the statutes' goal of making violation more costly than compliance.

Moreover, the countervailing policy concern that the Court found decisive in *City of Newport*—namely, the undesirability of penalizing innocent taxpayers for acts of misconduct by public officials from which the taxpayers have derived no benefit, *see* 453 U.S. at 266, 270—is largely absent here. The affirmative obligations imposed on public entities by Title II and Section 504 often have costs attached: modifying facilities, acquiring appropriate vehicles and other equipment, and training personnel so that people with disabilities are not denied the full benefits of public programs and services.[20] Unlike other civil rights statutes, violations of Title II will frequently stand to benefit taxpayers (at least in the short term) to some degree. The cost of compliance will likely exceed the costs that may be imposed in the few instances when a plaintiff sues for a violation and is able to establish that he has suffered actual damages.[21]

[20] As Arlene Mayerson, one of the architects of the ADA, has put it, "access can often cost money." Mayerson & Yee, *The ADA and Models of Equality*, 62 Ohio St. L.J. 535, 541 (2001). As the ADA's legislative history reflects, the enacting Congress recognized that "the integration of people with disabilities will sometimes involve substantial short-term burdens, both financial and administrative." H.R. Rep. No. 101-485(III), at 50 (1990).

[21] Moreover, injunctive relief, which could directly prevent future violations, may not be available to plaintiffs who cannot establish a likelihood that they will be subjected to the same unlawful conditions in the future. Here, for example, respondent Gorman's injuries resulted from his treatment following an arrest—events that this Court's decisions suggest would be insufficient to provide him Article III standing to seek prospective relief. *See City of Los Angeles v. Lyons*, 461 U.S. 95 (1983); *see, e.g., Shotz v. Cates*, 256 F.3d 1077 (11th Cir. 2001) (plaintiffs lacked standing to seek injunctive relief concerning inaccessibility of courthouse in absence of evidence they were likely to visit it again).

(*Footnote continued*)

To the extent such occasional damages awards fall short of the costs of actual compliance, they may be viewed by local governments as an acceptable cost of doing business, and taxpayers may benefit from reduced government expenditures attributable to ongoing failures to bring local government services into compliance with the Act. Similarly, taxpayers derive a windfall when, as in this case, local governments receive federal funding for many years without complying with their obligations under Section 504. Thus, unlike the situation in many Section 1983 lawsuits such as *Newport*, denying punitive damages will tend to under-deter violations significantly. Conversely, awarding them in appropriate cases, far from unfairly penalizing innocent taxpayers, will help to ensure that local government constituents do not benefit from their governments' unlawful conduct.

Newport's basic concerns thus have no application here, even if the Court entertains the *Newport* issue, now being raised in this Court for the first time in this 10-year-old litigation. Congress' clear intention to provide Title II plaintiffs with the full panoply of remedies, coupled with the important deterrent role punitive damages may play in advancing the sweeping policies of the ADA, compel rejection of petitioners' arguments that they should be insulated against punitive damages regardless of the nature of their conduct.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Eighth Circuit should be affirmed.

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